In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-680

THOMAS T. SCHRADER, PETITIONER

v.

SELECTIVE SERVICE SYSTEM LOCAL BOARD NO. 76 OF WISCONSIN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner commenced this pre-induction civil suit in the United States District Court for the Eastern District of Wisconsin on November 25, 1970, seeking to enjoin his outstanding induction order of November 23, 1970, and to obtain reclassification to Class III-A (fatherhood deferment). The district court, relying on an earlier class-action decision by the Michigan district court in *Gregory* v. *Hershey*, 311 F. Supp. 1 (E.D. Mich.), then pending on appeal to the Sixth

Circuit, temporarily restrained petitioner's induction (Pet. App. A7-A15).[1]

Thereafter the Sixth Circuit reversed the Michigan district court's judgment (*Gregory* v. *Tarr*, 436 F.2d 513, certiorari denied, 403 U.S. 922), and the government moved in this case for dissolution of the restraining order. The Wisconsin district court denied the motion, ruling that, since petitioner was a member of the class covered by the Michigan district court's decree, *i.e.*, a registrant seeking fatherhood status after holding a graduate student (II-S) deferment under the 1967 Act, he was protected from the November 1970 induction order by the unstayed mandate of the district court in *Gregory*. A divided court of appeals reversed (Pet. App. A20-A29).

Petitioner contends here, as he did below, that issuance of his induction order despite the mandate of the district court in *Gregory* constitutes unlawful action that warrants preinduction judicial review under Section 10(b)(3), 50 U.S.C. App. 460(b)(3). He makes essentially the same arguments that were presented in the petition for certiorari in *Sandler* v. *National Director of Selective Service*, No. 72-309, which was denied on November 6, 1972.

As we pointed out in our brief in opposition in

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[1] The Michigan court had ruled that fathers who had received II-S deferments under the 1967 Act while graduate students, rather than undergraduates, could not be denied fatherhood deferments simply because they held the earlier classification, even though 32 C.F.R. (1970 ed.) 1622.30(a) so specified. The induction of registrants in this category was enjoined by the Michigan district court.

Sandler,[2] the board's denial of petitioner's request for a fatherhood deferment, because he had earlier held a graduate student (II-S) deferment under the 1967 Act, was in accord with the existing Selective Service regulation, 32 C.F.R. (1970 ed.) 1622.30(a), and was not "administrative action, based on reasons unrelated to the merits of the claim * * * depriv[ing] the registrant of the classification to which, otherwise and concededly, he is entitled by statute" (*Fein* v. *Selective Service System*, 405 U.S. 365, 374-375). This, then, is not the type of case permitting judicial review prior to induction.

While petitioner places heavy emphasis on the fact that his induction order issued at a time when the district court's judgment in *Gregory* was outstanding, that is not an adequate basis for granting him the relief he now seeks. As we pointed out in response to the same argument in *Sandler*, petitioner's induction order had been stayed pending review of the Michigan decree by the court of appeals; when the Sixth Circuit reversed in *Gregory*, petitioner, like the plaintiffs in *Gregory* and all other members of the alleged class, was subject to immediate induction. It is undisputed that petitioner is not now entitled to a fatherhood deferment on the basis of any *res judicata* effect of the *Gregory* district court decision. Similarly, he cannot rely upon that decision to justify a pre-induction challenge to the denial of his fatherhood deferment while refusing to recognize that, as a result

[2] A copy of our *Sandler* brief in opposition is being furnished to petitioner's counsel.

of the court of appeals' reversal, that judgment "collapsed" and was of no further effect (*Pasquier v. Torr*, 444 F.2d 116, 117 (C.A. 5)).

The court of appeals' ruling that in these circumstances Section 10(b)(3) bars preinduction review of the denial of petitioner's fatherhood deferment is in accord with the consistent line of decisions rejecting similar attempts by registrants who are not parties to the *Gregory* suit to rely upon the reversed district court decision in that case to avoid induction.[3] There is no cause for further review of that ruling.[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

NOVEMBER 1972.

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[3] See cases cited at p. 9 of our brief in opposition in *Sandler*.

[4] We point out that the issue raised in the petition has limited importance. It involves only a narrow category of registrants—those who (a) were denied fatherhood deferments because they had received a graduate student deferment after June 30, 1967 and (b) were issued an induction order while the *Gregory* decision was pending on appeal. The number of registrants so situated necessarily is extremely small, and, in light of the court of appeals' ruling in *Gregory*, none of them is entitled to the deferred fatherhood status they claim as a basis for avoiding induction. Moreover, the issue is of no significance to new registrants, since the fatherhood deferment was terminated in 1970. See Executive Order No. 11527, April 23, 1970, 35 F.R. 6571, revoking 32 C.F.R. (1970 ed.) 1622.30(a).

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